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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION  
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11 KEITH VAN TRAN, ) Case No. EDCV 15-0671 AS  
12 )  
13 Plaintiff, )  
14 v. ) MEMORANDUM OPINION AND  
15 ) ORDER OF REMAND  
16 CAROLYN W. COLVIN, )  
17 Acting Commissioner of Social )  
18 Security Administration, )  
19 Defendant. )  
20 )  
21 )  
22 )  
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28 )

18 Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY  
19 ORDERED that this matter is remanded for further administrative  
20 action consistent with this Opinion.  
21

22 PROCEEDINGS  
23

24 On April 8, 2015, Plaintiff filed a Complaint seeking review of  
25 the denial of his Application for Social Security Disability  
26 Insurance Benefits. (Dkt. No. 1). The parties have consented to  
27 proceed before the undersigned United States Magistrate Judge.  
28

1 (Dkt. Nos. 9, 10). On August 17, 2015, Defendant filed an Answer  
2 and the Administrative Record ("AR"). (Dkt. Nos. 13, 14). The  
3 parties filed a Joint Position Statement ("Joint Stip.") on November  
4 30, 2015, setting forth their respective positions regarding  
5 Plaintiff's claims. (Dkt. No. 17).

6  
7 The Court has taken this matter under submission without oral  
8 argument. C.D. Cal. L.R. 7-15; (Dkt. No. 7 (Order Re: Procedures In  
9 Social Security Case)).

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11 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**  
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13 On January 19, 2012, Plaintiff, formerly employed as a casino  
14 dealer from 2001 to 2011 and a cell phone and laptop technologist  
15 from 1997 to 2001, (AR 176-78), filed an Application for Disability  
16 Insurance Benefits, alleging that he became unable to work because  
17 of his disabling condition on June 1, 2011, (AR 144-49). On October  
18 11, 2013, Administrative Law Judge ("ALJ"), Marti Kirby, heard  
19 testimony from Plaintiff and vocational expert Corinne Porter. (AR  
20 32-52). On November 8, 2013, the ALJ issued a decision denying  
21 Plaintiff's application. (AR 18-31).

22  
23 After determining that Plaintiff had the severe impairments of  
24 rheumatoid arthritis, ankylosing spondylitis and cervical myofascial  
25 pain, (see AR 20),<sup>1</sup> the ALJ found that Plaintiff had the residual

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27 <sup>1</sup> The ALJ found that Plaintiff's right foot injury was not a  
28 severe impairment.

functional capacity ("RFC")<sup>2</sup> to perform "a range of" "light work"<sup>3</sup> with the following limitations:

[T]he claimant can lift and/or carry 20 pounds occasionally and 10 pounds frequently; he can stand and/or walk for two hours out of an eight-hour workday, but no more than 15 minutes at a time, with regular breaks; he can sit for six hours out of an eight-hour workday, but with brief position changes after approximately 30 to 45 minutes, with regular breaks; he is unlimited with respect to pushing and/or pulling, other than as indicated for lifting and/or carrying; he can perform postural activities on an occasional basis except he cannot climb ladders, ropes, or scaffolds; he cannot work at unprotected heights, around moving machinery, or around other hazards; he cannot perform work requiring hypervigilance or intense concentration on a particular task, meaning he cannot be off task for even the briefest amount of time like watching a surveillance monitor or safety might be an issue; he must avoid concentrated exposure to extreme temperatures and humidity; and he is precluded from fast-paced production or assembly line-type work.

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<sup>2</sup> A claimant's RFC is what he or she still can do despite existing exertional and nonexertional limitations. 20 C.F.R. §§ 404.1545(a)(1).

<sup>3</sup> "Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time." 20 C.F.R. §§ 404.1567(b).

1 (AR 21). In addition, the ALJ determined that Plaintiff had  
2 concentration limitations, but not a severe mental impairment,  
3 caused by side effects of medication that would affect Plaintiff's  
4 ability to maintain concentration and hypervigilance during the  
5 course of a workday. (Id.).  
6

7 The ALJ found that Plaintiff was not able to perform his past  
8 relevant work as a casino dealer and technologist, (AR 25), but that  
9 jobs existed in significant numbers in the national economy that  
10 Plaintiff could perform. (AR 25-26). The ALJ determined that  
11 Plaintiff would be capable of performing the requirements of  
12 representative occupations identified by the vocational expert, such  
13 as the occupations of ticket seller (Dictionary of Occupational  
14 Titles ("DOT") 211.467-030), information clerk (DOT 237.367-018),  
15 and addresser (DOT 209.587.010). (AR 26). The ALJ therefore  
16 concluded that Plaintiff was not under a disability within the  
17 meaning of the Social Security Act. (Id.).  
18

19 On December 23, 2013, Plaintiff filed a timely request for the  
20 Appeals Council to review the ALJ's decision. (AR 12-14). On  
21 February 13, 2015, the Appeals Council denied Plaintiff's request  
22 for review, (AR 1-4), and the ALJ's decision became the final  
23 decision of the Commissioner. (AR 1). The Court reviews the  
24 Commissioner's decision pursuant to 42 U.S.C. §§ 405(g).  
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**STANDARD OF REVIEW**

The Court reviews a final decision of the Commissioner of the Social Security Administration to determine if the decision is free of legal error and supported by substantial evidence. Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial evidence" is more than a mere scintilla, but less than a preponderance. Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). To determine whether substantial evidence supports a finding, "a court must consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion." Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (internal quotation omitted). "If the evidence can reasonably support either affirming or reversing the ALJ's conclusion, [a court] may not substitute [its] judgment for that of the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).

**PLAINTIFF'S CONTENTIONS**

Plaintiff alleges that the ALJ erred by (1) improperly considering the relevant medical evidence in the record, including Plaintiff's treating physician's specific residual functional capacity limitations, (Joint Stip. 10); and (2) rejecting Plaintiff's testimony regarding the severity of his symptoms by (a) failing to specify which statements by Plaintiff were not sufficiently credible, (b) erroneously relying on the conservative

1 course of treatment prescribed by Plaintiff's physicians, and (c)  
2 improperly relying on a lack of objective medical evidence, (Joint  
3 Stip. 20).

#### 4 5 DISCUSSION

6  
7 After reviewing the record, the Court finds that Plaintiff's  
8 second claim warrants remand for further consideration. Because  
9 remand is appropriate on the issue of whether the ALJ improperly  
10 rejected Plaintiff's testimony as not credible, the Court declines  
11 to consider Plaintiff's contention that the ALJ improperly  
12 considered the relevant medical evidence.

#### 13 14 A. The ALJ Erred In Finding Plaintiff's Statements Describing His 15 Symptoms Not Credible

16  
17 In deciding whether to accept a claimant's subjective symptom  
18 statements, an ALJ must perform two stages of analysis. First, the  
19 ALJ must conduct a threshold inquiry whether the claimant has  
20 produced objective medical evidence establishing a medically-  
21 determinable impairment reasonably likely to be the cause of the  
22 claimant's subjective symptoms. Smolen v. Chater, 80 F.3d 1273,  
23 1281 (9th Cir. 1996); Bunnell v. Sullivan, 947 F.2d 341, 343 (9th  
24 Cir. 1991). Second, if the ALJ finds that the claimant has produced  
25 objective medical evidence of an underlying impairment that could  
26 reasonably be expected to produce the pain or other symptoms  
27 alleged, and there is no evidence of malingering, the ALJ may reject

1 the claimant's testimony regarding the severity of his pain and  
2 symptoms only by articulating specific, clear and convincing reasons  
3 for doing so. Brown-Hunter v. Colvin, 806 F.3d 487, 492-93 (9th  
4 Cir. 2015) (citing Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th  
5 Cir. 2007)); Smolen, 80 F.3d at 1283-84 (citation omitted).

6  
7 After describing this two-part inquiry (AR 21-22), the ALJ  
8 summarized Plaintiff's testimony regarding the severity of his  
9 symptoms as follows: (1) Plaintiff could not work because of  
10 generalized joint pain throughout his body that was most severe in  
11 his back, that measured an 8 or 9 on a 10-point pain scale with  
12 medication treatment, and that made every movement painful, (AR 22);  
13 (2) treating physicians prescribed Plaintiff medication--i.e.,  
14 narcotics to alleviate his pain and Humira injections to treat his  
15 arthritis--but these medications did not alleviate his symptoms, (AR  
16 22); and (3) "[Plaintiff] could not stand or sit for long periods of  
17 time[,] could . . . not lift more than five pounds[,] sometimes  
18 needed help dressing, . . . did not sleep" for more than four or  
19 five hours a day, and could only sleep in hour blocks of time, (AR  
20 22). The ALJ also summarized the additional statements Plaintiff  
21 made in his function report regarding the severity of his symptoms:  
22 (1) Plaintiff needed constantly to change positions because of pain;  
23 (2) Plaintiff had difficulty with personal care, reaching, and  
24 postural activities (e.g., squatting, bending, and kneeling); and  
25 (3) Plaintiff had numbness in his hands. (AR 22).

1 The ALJ found that Plaintiff's reported subjective symptoms  
2 satisfied the first threshold inquiry because Plaintiff's "medically  
3 determinable impairments could reasonably be expected to cause some  
4 of the alleged symptoms." (AR 22). However, the ALJ rejected  
5 Plaintiff's subjective statements regarding the severity of his  
6 symptoms, finding that the "statements concerning the intensity,  
7 persistence and limiting effects of [his alleged] symptoms [were]  
8 not credible to the extent those statements [were] inconsistent with  
9 the residual functional capacity assessment." (Id.).

10  
11 The ALJ articulated two reasons to support her finding that  
12 Plaintiff's statements were not credible: lack of objective medical  
13 evidence and conservative treatments prescribed.<sup>4</sup> With respect to  
14

15 <sup>4</sup> Defendant contends that the ALJ's adverse credibility finding  
16 was also based on a third reason: i.e., "several medical opinions  
17 that contradicted Plaintiff's claims of total disability." (Joint  
18 Stip. 22). While the ALJ did, in fact, summarize the medical  
19 opinions of the consultative examiner and the state agency  
20 physicians, the ALJ did not base her adverse credibility finding on  
21 these opinions. The Court cannot affirm an ALJ's credibility  
22 determination based on a reason that the ALJ did not rely on in  
23 making that determination. Cf. Burrell v. Colvin, 775 F.3d 1133,  
24 1138-39 (9th Cir. 2014) (explaining that although "[t]he government  
25 argues that Claimant's testimony that she has, on average, one or  
26 two headaches a week conflicts with the medical record[,] the ALJ  
27 never connected the medical record to Claimant's testimony about her  
28 headaches" and "never stated that he rested his adverse credibility  
determination on those findings," and therefore holding that the  
court cannot conclude that the "history of treatment for headaches  
is a specific, clear, and convincing reason to support the  
credibility finding"); see also Pinto v. Massanari, 249 F.3d 840,  
847-48 (9th Cir. 2001) (the court "cannot affirm the decision of an  
agency on a ground that the agency did not invoke in making its  
decision").



1 the lack of objective evidence, the ALJ explained that "[a]llthough  
2 the claimant alleged pain and functional limitations associated with  
3 Rheumatoid arthritis symptoms, . . . there was little evidence of  
4 consistent episodes of swelling or reduced range of motion . . .  
5 that would be common with rheumatoid arthritis symptoms." (AR 22).  
6 The ALJ further indicated that "[d]iagnostic studies also did not  
7 support the alleged severity of the claimant's symptoms and  
8 resulting functional limitations." (Id.). Thus, the ALJ found  
9 that, "[a]s the severity of claimant's assertions were not supported  
10 by the medical evidence, his allegations were not entirely  
11 credible." (Id.).  
12

13 With respect to the finding that Plaintiff had only received  
14 conservative treatment, the ALJ noted that all of the treatment  
15 records revealed that "the claimant received routine, conservative,  
16 and non-emergency treatment," (AR 23), including (1) a January 18,  
17 2011, spine and left joint x-ray; (2) medication and a  
18 recommendation to remain off of work for four weeks to treat  
19 complaints of back, neck and foot pain and clinical findings of  
20 tenderness in those areas at a June 2, 2011, examination; (3)  
21 medication to treat continued pain complained of and clinical  
22 findings of lower back tenderness at a July 25, 2011, examination;  
23 (4) two physical therapy treatments to address complaints of joint  
24 back pain; (5) a January 10, 2012, x-ray examination; and (6) a  
25 medication refill to address complaints of back pain and clinical  
26 findings of neck and back tenderness at a July 24, 2012,  
27  
28

1 examination. (Id.)<sup>5</sup> The ALJ further noted that Plaintiff had not  
2 been treated with any surgical interventions and explained that the  
3 "lack of more aggressive treatment or surgical intervention suggests  
4 the claimant's symptoms and limitations were not as severe as he  
5 alleged." (AR 22).

6  
7 **1. The ALJ Articulated the Specific Statements That She Found**  
8 **Not Credible**  
9

10 Plaintiff first contends that the ALJ's reasons do not satisfy  
11 the clear and convincing standard because the ALJ "clearly failed to  
12 specify which statements by Plaintiff concerning pain, functional  
13 limitations, and other symptoms were not 'sufficiently credible.'" (Joint Stip. at 20, citing Smolen, 80 F.3d at 1284 (an ALJ "must  
14 state specifically which symptom testimony is not credible and what  
15 facts in the record lead to that conclusion"))).

16  
17  
18 An ALJ is not "'required to believe every allegation of  
19 disabling pain' or other non-exertional impairment." Orn v. Astrue,  
20 495 F.3d 625, 635 (9th Cir. 2007) (quoting Fair v. Bowen, 885 F.2d  
21 597, 603 (9th Cir. 1989)). To discredit a claimant's testimony when  
22 a medical impairment has been established, however, the ALJ must  
23

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24  
25 <sup>5</sup> Although the ALJ noted that the "period at issue begins  
26 on the alleged onset date of June 1, 2011," the ALJ, "in order to  
27 view the record in the light most favorable to the claimant, . . .  
28 read and considered all the medical evidence in the record." (AR 23).

1 provide "'specific, cogent reasons for the disbelief.'" Id.  
2 (quoting Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 5951 599  
3 (9th Cir. 1999)).

4  
5 After acknowledging that she was required to "make a finding on  
6 the credibility of [Plaintiff's] statements based on a consideration  
7 of the entire case record," the ALJ specifically identified  
8 Plaintiff's statements regarding his pain and functional limitations  
9 and concluded that, "[a]llthough the claimant alleged pain and  
10 functional limitations associated with rheumatoid arthritis  
11 symptoms, his allegations were not supported by the medical  
12 evidence." (AR 22). The ALJ specifically explained, for example,  
13 that "there was little evidence of consistent episodes of swelling  
14 or reduced range of motion . . . that would be common with  
15 rheumatoid arthritis symptoms," and that "[d]iagnostic studies also  
16 did not support the alleged severity of the claimant's symptoms and  
17 resulting functional limitations." (AR 22). The ALJ further  
18 concluded that the subjective symptoms identified by Plaintiff were  
19 not credible because the record established that Plaintiff received  
20 conservative, routine and non-surgical treatment that was  
21 inconsistent with the severe symptoms Plaintiff reported, and  
22 specifically identified the treatment evidence upon which she  
23 relied. (AR 22-23). Thus, the ALJ satisfied her obligation to  
24 state specifically which symptom testimony and statements she found  
25 not credible and the facts in the record that support that finding.  
26 Cf. Smolen, 80 F.3d at 1283-84.

2. The ALJ's Reliance On Conservative Treatment Was Not A Clear And Convincing Reason To Find Plaintiff's Statements Not Credible

Plaintiff claims that the ALJ erroneously relied on the conservative course of treatment prescribed by Plaintiff's physicians to support her finding that Plaintiff's statements describing the severity of his symptoms were not credible. (Joint Stip. at 19). "Where, as here, the ALJ did not find 'affirmative evidence' that the claimant was a malingerer," the ALJ was required to provide a clear and convincing reason for rejecting Plaintiff's statements. Orn, 495 F.3d at 635 (quoting Morgan, 169 F.3d at 599). The ALJ does not cite to any evidence in the record of malingering and therefore the "clear and convincing" standard applies.

Although the ALJ opined that the "lack of more aggressive treatment or surgical intervention suggests the claimant's symptoms and limitations were not as severe as he alleged," (AR 22), Plaintiff contends that his treating physician determined that he "is not [a] surgical candidate," (AR 408 (noting under section for "Complications" that Plaintiff's condition was "worsening" and that Plaintiff "is not a surgical candidate"))), and hypothesizes that "[m]ost likely, this is because his entire spine is severely effected [sic] by the ankylosing spondylitis," (Joint Stip. at 18). Plaintiff also argues that the ALJ "has failed to suggest any surgical procedure that might in any way relieve any of Plaintiff's symptoms, and [that] no medical professional . . . has made any

1 [such] suggestion[.]” (Id.). Plaintiff further asserts that the  
2 ALJ “has failed to identify any ‘more aggressive treatment’ which  
3 might somehow improve Plaintiff’s conditions or which might be a  
4 better form of treatment” than the numerous medications, including  
5 narcotic pain medication and Humira, that Plaintiff’s treating  
6 physicians already have prescribed. (Joint Stip. at 18-19).  
7 According to Plaintiff, the mere suggestion that the existence of  
8 some hypothetical “other form of ‘aggressive’ treatment” renders  
9 Plaintiff not credible “simply makes no sense and is inconsistent  
10 with the facts in this case.” (Joint Stip. at 19).  
11

12 Defendant asserts that “[w]hile Plaintiff speculates as to why  
13 Dr. Lee stated he was not a surgical candidate, that does not change  
14 the validity of the ALJ’s finding that the lack of more aggressive  
15 treatment or surgical intervention diminished the credibility of  
16 Plaintiff’s subjective complaints.” (Joint Stip. at 24). Defendant  
17 further contends that “it was reasonable for the ALJ to infer that  
18 the lack of surgical intervention indicated Plaintiff’s symptoms  
19 were not disabling.” (Id.).<sup>6</sup>  
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21 <sup>6</sup> Defendant also argues that the ALJ’s adverse credibility  
22 finding is also supported by other evidence of conservative  
23 treatment: (1) treatment notes indicating that Plaintiff’s  
24 condition generally remained unchanged and treatment providers  
25 frequently continued him on the same medication; (2) Plaintiff’s  
26 physician recommending routine follow-up as needed; and (3) gaps in  
27 Plaintiff’s treatment. While the ALJ summarized the treatment notes  
28 and indicated that there was no evidence that the claimant had  
received treatment between April 30, 2012, and July 24, 2012, (AR  
23), the ALJ did not specifically base her adverse credibility  
finding on these factors. The Court will not affirm the ALJ’s

1 Evidence of conservative treatment may be "sufficient to  
2 discount a claimant's testimony regarding severity of an  
3 impairment," Parra v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007)  
4 (citation omitted), provided that there is substantial evidence in  
5 the record to support the ALJ's finding that Plaintiff's treatment  
6 was conservative. "There is no guiding authority on what exactly  
7 constitutes 'conservative' or 'routine' treatment." Childress v.  
8 Colvin, No. 13-CV-3252-JSC, 2014 WL 4629593, \*12 (N.D. Cal. Sept.  
9 16, 2014). It is clear that courts view the use of non-prescription  
10 medication as conservative treatment. See, e.g., id. (holding that  
11 the ALJ did not err by finding the claimant's testimony regarding  
12 severity of symptoms not credible where the claimant was treated  
13 with over-the-counter pain medication); Ritchie v. Astrue, No. EDCV  
14 12-311 JC, 2012 WL 3020012, \*5 (C.D. Cal. July 24, 2012)  
15 ("[A]lthough plaintiff testified that she was unable to work due to  
16 pain in her back and hips, she also stated that she did not 'like'  
17 narcotics, and took only over-the-counter pain medication (i.e.  
18 Tylenol, aspirin or Advil)," which cast doubt on the plaintiff's  
19 credibility.); Boyce v. Astrue, No. 6:11-CV-06278-SI, 2012 WL  
20 4210628, \*7 (D. Or. Sept. 19, 2012) (holding that "conservative  
21 treatment" consisted of "crutches, ice, and non-narcotic pain  
22 medication"). Moreover, "[s]everal courts in this circuit have  
23 found the use of medication to control spinal pain, and the absence  
24

25 decision to discredit Plaintiff's testimony based upon reasons that  
26 ALJ did not specifically articulate. Cf. Burrell v. Colvin, 775  
27 F.3d 1133, 1138-39 (9th Cir. 2014); Pinto v. Massanari, 249 F.3d  
840, 847-48 (9th Cir. 2001).

1 of surgery or injections, to be 'conservative' treatment."  
2 Childress, 2014 WL 4629593, at \*12 (citations omitted).

3  
4 Here, the record contains no evidence that more aggressive  
5 treatments or surgical interventions were available options for  
6 Plaintiff's conditions. Cf. id. at \*13 (declining to hold that the  
7 use of medication to control spinal pain and the absence of surgery  
8 or injections is conservative treatment because "there is no  
9 evidence in the record that surgery or injections were an available  
10 or viable option for Plaintiff's condition"). Plaintiff's  
11 physicians noted only that surgery was not "indicated," (AR 333,  
12 358, 361), and that Plaintiff was "not [a] surgical candidate," (AR  
13 408 (noting under section for "Complications" that Plaintiff's  
14 condition was "worsening" and that Plaintiff "is not [a] surgical  
15 candidate"))). However, the record does not contain any evidence  
16 establishing why surgery was not indicated and therefore cannot  
17 support an inference that Plaintiff did not require surgery or other  
18 invasive procedures to treat his symptoms. Compare Shimer v.  
19 Colvin, No. 13-CV-2200 AC, 2014 WL 7336674, \*10 (E.D. Cal. Dec. 24,  
20 2014) (holding that the ALJ did not err in relying on the  
21 plaintiff's conservative treatment as a basis for finding the  
22 plaintiff not credible, explaining that the "record shows that  
23 plaintiff did not require surgery or other invasive procedures for  
24 his pain management" and "nor did any physician suggest such  
25 procedures in their examination notes," and noting that plaintiff  
26 only was treated with "a recommendation to utilize hydrotherapy and  
27  
28

1 dynamic soft tissue mobilization ('DSTM') with a limited number of  
2 prescriptions for pain medication").

3  
4 The Court rejects Defendant's contention that "it was  
5 reasonable for the ALJ to infer that the lack of surgical  
6 intervention indicated Plaintiff's symptoms were not disabling."  
7 (Joint Stip. at 24). An ALJ is not qualified to draw her own  
8 inference regarding whether more aggressive courses of treatment are  
9 available for a claimant's conditions. See, e.g., Boitnott v.  
10 Colvin, No. 12-CV-2977-BTM(DHB), 2016 WL 362348, \*4 (S.D. Cal. Jan.  
11 29, 2016) (an ALJ is not qualified to draw his own inference  
12 regarding whether more aggressive courses of treatments were  
13 available) (citing Matamoros v. Colvin, No. 13-CV-3964-CW, 2014 WL  
14 1682062, \*4 (C.D. Cal. Apr. 28, 2014)); see also Social Security  
15 Ruling ("SSR") 96-7P (July 2, 1996) (providing that a claimant's  
16 "statements may be less credible if the level or frequency of  
17 treatment is inconsistent with the level of complaints" but  
18 cautioning that the "adjudicator must not draw any inferences about  
19 an individual's symptoms and their functional effects from a failure  
20 to seek or pursue regular medical treatment without first  
21 considering any explanations that the individual may provide, or  
22 other information in the case record, that may explain infrequent or  
23 irregular medical visits or failure to seek medical treatment").<sup>7</sup>

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24  
25 <sup>7</sup> An ALJ's reasons for rejecting a claimant's subjective  
26 evidence of his symptoms must comport with SSR 96-7p, which, among  
27 other things, explains the factors to consider in assessing the  
28 credibility of a claimant's statements about pain and other



1 Here, the ALJ simply assumed that surgery was not indicated  
2 because Plaintiff's condition and symptoms were not sufficiently  
3 severe to warrant surgical intervention. There is no evidence,  
4 however, that any physician determined that the severity of  
5 Plaintiff's condition did not warrant surgical intervention. To the  
6 contrary, the only evidence before the Court suggests that surgical  
7 intervention was not an available option, not that surgical  
8 intervention was not warranted because Plaintiff's condition and/or  
9 symptoms were not sufficiently severe. Plaintiff testified that  
10 surgery was not indicated because it could not be done. (AR 44  
11 (Plaintiff asked the specialist whether surgery was available "but  
12 she said cannot [do] surgery" "on [his] situation]" and the primary  
13 care physician said "cannot do it, cannot do the surgery either")).

14  
15 There is no evidence in the record to support the ALJ's finding  
16 that surgery or more aggressive treatments were available options to  
17 treat Plaintiff's conditions, and the ALJ was not qualified to draw  
18 her own inference regarding the availability of such options.  
19 Therefore, the absence of more aggressive treatments or surgical  
20 intervention was not a clear and convincing reason to discount the  
21 credibility of Plaintiff's statements regarding his symptoms and the  
22

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23 symptoms. Orn v. Astrue, 495 F.3d 625, 635-36 (9th Cir. 2007);  
24 Durham v. Apfel, No. CV-98-1422-ST, 1999 WL 778243, \*16 (D. Or.  
25 Sept. 22, 1999). "Although Social Security Rulings do not have the  
26 same force and effect as the statute or regulations, they are  
27 binding on all components of the Social Security Administration,  
28 . . . and are to be relied upon as precedent in adjudicating cases."  
Orn, 495 F.3d at 635 (citing 67 Fed. Reg. at 57860)) (additional  
citation omitted).

1 severity of his pain. Cf. Childress, 2013 WL 2643305, at \*13  
2 (explaining that "there is no evidence in the record that surgery or  
3 injections were an available or viable option for Plaintiff's  
4 condition" and therefore concluding that "in light of the ALJ's  
5 failure to identify . . . how there are alternative less-  
6 conservative treatment options, . . . this factor does not have any  
7 bearing on Plaintiff's credibility"); Lapeirre-Gutt v. Astrue, 382  
8 F. App'x 662, 664 (9th Cir. 2010) (explaining that, "[e]ven assuming  
9 Lapeirre-Gutt's regimen of powerful [narcotic] pain medications and  
10 [occipital nerve blocks and trigger point] injections can constitute  
11 'conservative treatment,'" "the record does not reflect that more  
12 aggressive treatment options are appropriate or available," and "[a]  
13 claimant cannot be discredited for failing to pursue non-  
14 conservative treatment options where none exist") (citations  
15 omitted).

16  
17 Moreover, it is not at all obvious to this Court that  
18 consistent treatment (over two years), including referrals to a  
19 specialist,<sup>8</sup> of Plaintiff's conditions with, among other  
20 medications, increasingly strong narcotic pain medications<sup>9</sup> and  
21

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22 <sup>8</sup> Plaintiff sought treatment from his primary care physician  
23 in 2011 almost monthly, (AR 234-44, 387-94), in 2012 from either his  
24 primary care physician or a specialist physician anywhere between  
25 every month to every three months (299-300, 269-72, 386), and in  
26 2013 from his primary care or specialist physicians monthly, (AR  
27 307-13, 324-34, 350-52, 357-62).

28 <sup>9</sup> Plaintiff's primary care physician initially prescribed  
Norco in early 2011, (AR 234-44, 299-300, 311-12, 349), and at the

1 Humira, (AR 324-33, 350-52, 357-362), as well as anti-inflammatory  
2 drugs and physical therapy, is "conservative" treatment. Cf. SSR  
3 96-7P (explaining that "a longitudinal medical record demonstrating  
4 an individual's attempts to seek medical treatment for pain or other  
5 symptoms and to follow that treatment once it is prescribed lends  
6 support to an individual's allegations of intense and persistent  
7 pain or other symptoms," and that "[p]ersistent attempts by the  
8 individual to obtain relief of pain or other symptoms, such as by  
9 increasing medications [and] referrals to specialists, . . . may be  
10 a strong indication that the symptoms are a source of distress to  
11 the individual and generally lend support to an individual's  
12 allegations of intense and persistent symptoms").

13  
14 There is no evidence that Plaintiff failed to follow a course  
15 of treatment for his conditions, that additional or more intensive  
16 or aggressive treatments or surgery were recommended or available to  
17 treat Plaintiff's conditions, or that Plaintiff's prescribed  
18 treatments of narcotic pain medications, Humira, referral to a  
19 specialist, and physical therapy were conservative. The absence of  
20 such evidence fails to support the ALJ's finding that Plaintiff's  
21 course of prescribed treatment indicated that Plaintiff's symptoms  
22 were not as severe as he alleged. Cf. Childress, 2014 WL 4629593,  
23 \*12 (ordering remand because the ALJ was not entitled to rely upon  
24 Plaintiff's treatment with narcotics as "conservative" to support  
25 beginning of 2013 prescribed Percocet instead of Norco, (AR 307-09)).  
26 The treatment records further establish that Plaintiff's specialist  
27 physician recommended continued treatment with Percocet throughout  
28 2013. (AR 324-34, 350-52, 357-62).

1 the adverse credibility finding when it was "not obvious" on the  
2 record that "the consistent use of such a narcotic (for several  
3 years) is 'conservative' or in conflict with Plaintiff's pain  
4 testimony"); Boitnott, 2016 WL 362348, \*4 (explaining "[t]here was  
5 no medical testimony at the hearing or documentation in the medical  
6 record that the prescribed medication constituted 'conservative'  
7 treatment of [the plaintiff's] conditions," and that the ALJ "was  
8 not qualified to draw his own inference regarding whether more  
9 aggressive courses of treatments were available for Plaintiff's  
10 conditions").

11  
12 Moreover, at the hearing, the ALJ did not endeavor to develop  
13 the record regarding the availability of less-conservative treatment  
14 options for Plaintiff's conditions, why these more aggressive  
15 treatment options were not recommended, and why Plaintiff's  
16 prescribed treatment was routine and conservative.<sup>10</sup> The Court  
17 therefore concludes that conservative treatment was not a clear and  
18

---

19 <sup>10</sup> An ALJ in a social security case has an independent "'duty  
20 to fully and fairly develop the record and to assure that the  
21 claimant's interests are considered.'" Smolen v. Chater, 80 F.3d  
22 1273, 1288 (9th Cir. 1996) (quoting Brown v. Heckler, 713 F.2d 441,  
23 443 (9th Cir. 1983)). The ALJ's duty to develop the record is  
24 triggered only when there is "ambiguous evidence" or when "the  
25 record is inadequate to allow for proper evaluation of the  
26 evidence[.]" Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir.  
27 2001). The ALJ may discharge this duty in several ways, including  
28 (1) subpoenaing the claimant's physicians, (2) submitting questions  
to the claimant's physicians, (3) continuing the hearing, or (4)  
keeping the record open after the hearing to allow supplementation  
of the record. Tidwell v. Apfel, 161 F.3d 599, 602 (9th Cir. 1998);  
Smolen, 80 F.3d at 1288.

1 convincing reason supported by substantial evidence for finding  
2 Plaintiff's subjective statements describing his pain and other  
3 symptoms not credible.

4  
5 **3. The ALJ's Reliance On A Lack Of Medical Evidence Was Not A**  
6 **Clear And Convincing Reason To Find Plaintiff's Statements**  
7 **Not Credible**  
8

9 Plaintiff argues that the ALJ erroneously relied upon a lack of  
10 objective medical evidence to support her finding that Plaintiff's  
11 statements describing the severity of his symptoms were not  
12 credible. (Joint Stip. 20). Plaintiff properly notes that the lack  
13 of objective medical evidence cannot, by itself, support an adverse  
14 credibility finding. Rollins v. Massanari, 261 F.3d 853, 857 (9th  
15 Cir. 2001).

16  
17 Because the Court has concluded that conservative treatment was  
18 not a clear and convincing reason to find Plaintiff's statements not  
19 credible, the sole remaining ground on which the ALJ rejected  
20 Plaintiff's credibility is a lack of objective medical evidence. As  
21 a matter of law, the lack of objective medical evidence, standing  
22 alone, cannot be a clear and convincing reason for finding a  
23 claimant's subjective statements regarding the severity of his pain  
24 and other symptoms not credible.

25 ///

26 ///

27 ///

1 **B. The ALJ's Error Was Not Harmless**

2  
3 The ALJ's stated reasons--i.e., conservative treatment and a  
4 lack of objective medical evidence--do not constitute clear and  
5 convincing reasons for finding Plaintiff's statements describing his  
6 pain and other symptoms not credible. The Court must determine  
7 whether the ALJ's error of failing to support her adverse  
8 credibility finding with substantial evidence was harmless. Cf.  
9 Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012) (explaining  
10 that harmless error principles apply in the Social Security context)  
11 (citing Stout v. Comm'r Soc. Sec. Admin., 454 F.3d 1050, 1054 (9th  
12 Cir. 2006)). Generally, "an ALJ's error is harmless where it is  
13 'inconsequential to the ultimate nondisability determination.'" Id.  
14 (citing Carmickle v. Comm'r Soc. Sec. Admin., 466 F.3d 880, 885 (9th  
15 Cir. 2006)) (additional citations omitted).

16  
17 The Court cannot conclude that the ALJ's adverse credibility  
18 finding constituted harmless error. Plaintiff's credibility was  
19 directly relevant to assessing his limitations and, in turn, his  
20 RFC. A claimant's RFC "may be the most critical finding  
21 contributing to the final . . . decision about disability."  
22 McCawley v. Astrue, 423 F. App'x 687, 689 (9th Cir. 2011) (quoting  
23 SSR 96-5p). Here, the ALJ assessed Plaintiff with an RFC to perform  
24 a range of light work, and this RFC was central to the ALJ's  
25 determination that Plaintiff is capable of making a successful  
26 adjustment to other work that exists in significant numbers in the  
27 national economy. (AR 25-26). Thus, the ALJ's error was not

1 "inconsequential to the ultimate disability determination,"  
2 Carmickle, 466 F.3d at 885, and the Court declines to deem the error  
3 harmless.

4  
5 **C. Remand For Additional Evidence Is Warranted**

6  
7 Whether to remand for further proceedings or to remand for an  
8 immediate award of benefits is within the district court's  
9 discretion. Harman v. Apfel, 211 F.3d 1172, 1173 (9th Cir. 2000).  
10 "Remand for further administrative proceedings is appropriate if  
11 enhancement of the record would be useful." Benecke v. Barnhart,  
12 379 F.3d 587, 593 (9th Cir. 2004). Conversely, where no useful  
13 purpose would be served by further administrative proceedings, or  
14 where the record has been fully developed, it is appropriate for the  
15 Court to exercise its discretion to direct an immediate award of  
16 benefits. Id. at 1179 ("[T]he decision of whether to remand for  
17 further proceedings turns upon the likely utility of such  
18 proceedings.").

19  
20 Here, the circumstances of the case suggest that further  
21 administrative review could remedy the Commissioner's errors. See  
22 supra at 16-20. Thus, remand for further administrative proceedings  
23 is appropriate. On remand, the ALJ must endeavor to develop the  
24 record with regard to whether Plaintiff's prescribed treatment was  
25 routine or conservative, whether more aggressive treatment options  
26 including surgery were available to treat Plaintiff's conditions,  
27

1 and, if so, why these more aggressive treatment options were not  
2 recommended. See Tonapetyan, 242 F.3d at 1150 (explaining that an  
3 ALJ must develop the record if evidence is inadequate to determine  
4 disability).

5  
6 The Court declines to rule on Plaintiff's claim that the ALJ  
7 failed to consider the relevant medical evidence in the record,  
8 including Plaintiff's treating physician's specific residual  
9 functional capacity limitations. (Joint Stip. at 10). Because this  
10 matter is being remanded, this issue also should be considered on  
11 remand.

12  
13 **ORDER**

14  
15 For the foregoing reasons, the decision of the Commissioner is  
16 REVERSED and the matter is REMANDED for further proceedings pursuant  
17 to Sentence 4 of 42 U.S.C. § 405(g).

18  
19 LET JUDGMENT BE ENTERED ACCORDINGLY.

20  
21 Dated: March 8, 2016

22 \_\_\_\_\_/s/\_\_\_\_\_  
23 ALKA SAGAR  
24 UNITED STATES MAGISTRATE JUDGE